Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1956

CLEAN LAND AIR WATER CORPORATION,
Petitioner,

versus

WASTE SYSTEMS, INC. and
ROLLINS ENVIRONMENTAL SERVICES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Clean Land Air Water Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1980. Because the decision of the court of appeals was simply a denial of CLAW's petition to review the judgment of the district court, CLAW respectfully requests that the Court consider both lower decisions in this petition.

OPINIONS BELOW

The opinion of the court of appeals and the opinion rendered by the District Court for the Eastern District of Texas appear in the Appendix hereto.

JURISDICTION

CLAW filed a petition for a writ of mandamus with the court of appeals to review the decision of the district court. The court of appeals denied the petition on April 29, 1980. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

Was there a failure by the district court to correctly apply and construe 28 USC § 1404(a), or to consider the relevant factors incident to a ruling upon a motion to transfer, or was there a clear abuse of discretion on its part.

Was there a clear abuse of discretion on the part of the court of appeals.

STATUTORY PROVISION

UNITED STATES CODE, TITLE 28:

§1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner Clean Land Air Water Corporation (CLAW) operated an injection well for the disposal of industrial wastes. The injection well, located in Iberville Parish, Louisiana was permitted and approved by the Louisiana Department of Conservation. On June 14, 1978 an "Agreement of Sale" was signed between CLAW and Rollins Environmental Services of Louisiana, Inc. Under the Agreement of Sale, Rollins had a 45 day option period to inspect the well and the books and records of CLAW before a final sale would be closed. Engineers from Rollins inspected the physical properties and Rollins' accountants inspected CLAW's books. A report literally over one inch thick was compiled by Rollins (Exhibit "Dixon #1," deposition of Lynwood Dixon, September 28, 1979). Rollins retained an independent consulting firm from New Orleans to make a geological study of the well and contacted several of CLAW's customers. On July 28, 1978, Rollins purchased the well and surrounding 20 acres, paying $800,000.00 in cash and giving promissory notes totaling $2.1 million for the balance.

On August 2, 1978, Waste Systems, Inc. (WSI), a Texas corporation, filed suit in the Eastern District of Texas, Beaumont Division, seeking injunction relief against Rollins and CLAW and damages of $500,000.00. WSI acted as a broker, arranging for waste material generated by Mobil Oil Corporation to be disposed of in the injection well. At a hearing held on August 14, 1978, WSI contended it had a long-term written contract with CLAW whereby CLAW was obligated to accept from WSI 500,000 barrels, or 21 million gallons, of the Mobil waste material. The alleged contract was signed by Donald Antie, an employee of CLAW. CLAW officials testified they

had no knowledge of the alleged contract and denied the authority of Donald Antie to enter into the written agreement as alleged by WSI. Injunctive relief was granted to WSI, however, in effect forcing Rollins to accept material from WSI on WSI's terms.

Deposition testimony has revealed that while Donald Antie purportedly negotiated a contract with WSI on behalf of CLAW to receive 21 million gallons of the Mobil waste material at 4½¢ per gallon, Mr. Antie without CLAW's knowledge negotiated an agreement for himself whereby WSI paid to him or his wholly-owned Louisiana corporation, the "A.I.E. Corporation," ½¢ per gallon on the Mobil material.[1] WSI has admitted making these payments (Deposition of Robert L. Howard, April 4, 1979, p. 22) and Mr. Antie has admitted receiving them and depositing checks received at his home in Watson, Louisiana into an account at the 1st National Bank of Denham Springs, Louisiana (Deposition of Donald A. Antie, May 14 and 15, 1979, p. 138).

On January 10, 1979, Rollins filed a cross-claim against CLAW which sought indemnification on the claim of WSI and alleged that the well was in a "condition of disrepair" when purchased and sought damages for repairing the well ($200,000.00) and for lost profits ($500,000.00). Louisiana counsel was retained by CLAW, and enrolled on May 5, 1979. On May 22, 1979 CLAW filed a counterclaim against WSI on unpaid invoices totaling $376,000.00 and on July 16, 1979 filed a cross-claim against Rollins for unpaid invoices and unjust enrichment whereby Rollins had collected accounts receivable of

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1. 500,000 barrels (21 million gallons) at 1/2 cent per gallon totals $105,000.00. As a full-time employee of CLAW, Donald Antie received a salary of $25,000.00 per year and the use of a car.

CLAW earned before but collected (by Rollins) after the sale of the well. These claims total approximately $80,000.00.

On August 8, 1979 Rollins filed an amended cross-claim, which named as additional defendants Cyril Hinds and Lawrence J. Thompson, officers of CLAW. In addition to its previous claims, Rollins sought "punitive or exemplary damages" from Mr. Hinds in the amount of $1 million, and from Mr. Thompson in the amount of $500,000.00, based on allegations of "fraudulent conspiracy," "malicious intent," and "callous disregard for human life and public safety." These allegations are based on events supposedly occurring in Iberville Parish relative to the purchase of the well by Rollins.

On September 24, 1979, CLAW filed a Motion for Separate Trials and Change of Venue asking that the principal demand of WSI regarding the alleged contract be tried separately from the cross-claims of CLAW and Rollins involving the sale of the injection well. CLAW sought to have the entire action transferred to the Middle District of Louisiana, pursuant to 28 USC § 1404(a), or in the alternative to have the cross-claims of CLAW and Rollins transferred. On January 24, 1980 the district court denied CLAW's motion in all respects (Appendix p. 1). CLAW sought review from the court of appeals by filing a petition for a writ of mandamus,[2] which was denied. (Appendix p. 3).

REASONS FOR GRANTING THE WRIT

CLAW submits the following points merit the Court's attention:

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2. The Fifth Circuit has held that mandamus is the appropriate vehicle for review of a motion to transfer under §1404(a), *Garner v. Wolfinbarger*, 433 F. 2d 117 (5 Cir. 1970).

I.

If trial is forced in the Eastern District of Texas, crucial and necessary witnesses will be outside the subpoena power of the trial court.[3] CLAW believes nearly all material witnesses regarding the authority of Donald Antie to enter into the alleged contract, and all witnesses to the circumstances of the Louisiana sale by CLAW to Rollins and the condition of the well, are located in the Middle District of Louisiana. The only witnesses located in Texas are the principals of WSI who negotiated the purported contract with CLAW. These are corporate officers of WSI (WSI consists of only 4 people) under its control and they can easily be produced for trial in Baton Rouge.

Further, Mr. Hinds and Mr. Thompson will be forced to defend claims which are personal attacks, for damages totalling $1.5 million, based on allegations of "fraud" and "malicious intent" and "gross misconduct." Though the claims are frivolous, they should not have to rely on depositions to defend them when live testimony is available.

The Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 511, 67 S. Ct. 839, 844 (1947), stated, "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to court, jury, or most litigants." Furthermore, "the importance of live witnesses at a trial revolving about charges of fraudulent con-

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3. These witnesses are located more than 100 miles from Beaumont and their attendance cannot be compelled there, Rule 45(e) Federal Rules of Civil Procedure. However, these witnesses would be subject to the subpoena power of the federal court in Baton Rouge.

duct is evident," *Oil and Gas Venture - First 1958 Fund, Ltd. v. Kung*, 250 F. Supp. 744, 756 (D.C.N.Y. 1966).

II.

Louisiana law should be applied to all claims. All claims in litigation arose there. Texas conflict of laws rules will apply even if the case is transferred to Louisiana, *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964). However, those rules indicate Louisiana law will apply.

Donald Antie, the employee who signed the alleged contract with WSI on behalf of CLAW, was not an officer nor a board member nor was there any corporate resolution or attestation giving him corporate authority. The authority of a Louisiana agent on behalf of a Louisiana corporation to enter into a contract to be performed in Louisiana should obviously be governed by Louisiana law. Even though the "contract" was purportedly executed in Texas, under Texas law the construction of a contract executed in Texas but performed wholly in Louisiana is according to Louisiana law. *Gorsalitz v. Olin Mathieson*, 429 F. 2d 1033 (5 Cir. 1970).

The claims of Rollins on the injection well derive from the sale of Louisiana immovable, or real, property. Conflict of laws rules dictate that a Texas court would apply Louisiana law in this case, regardless of which major conflict of laws analysis or approach is taken, whether it be:

a) situs of the property

b) contract choice of law rules

c) a weighing of interests analysis[4]

The well and surrounding 20 acres were transferred before a Notary Public in Baton Rouge, Louisiana. Louisiana is the situs of the property, the state of contracting, the state where negotiations took place, the place of performance, the domicile of the seller, and the state where both buyer and seller did business.

The applicable Louisiana law in determining the obligation of a seller of immovable property to respond in warranty for the condition of the property sold would be an action in redhibition under the Louisiana Civil Code, whereby the sale may be avoided (Art. 2520) or the price reduced (Art. 2543) and damages paid (Art. 2545).

III.

The injection well from which all events in litigation spring is located approximately 30 miles from the federal court in Baton Rouge. Trial would be infinitely more convenient and WSI certainly would not be prejudiced by transfer to the Middle District of Louisiana. For a period of more than one year prior to suit WSI had been shipping waste materials into Louisiana, and in fact the main thrust of its suit is to gain the right to continue doing business in the Middle District of Louisiana on a regular basis. If trial is held in Texas, all of CLAW's witnesses as to the validity of the "contract" with Waste Systems will have to be brought to Texas. All of the witnesses to the circumstances of the Louisiana sale by CLAW

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4. See *Teas v. Kimball*, 257 F. 2d 817 (5 Cir. 1958); *C.I.R. v. Scaggs*, 122 F. 2d 721 (5 Cir. 1941). See also 28 Southwestern Law Journal 202 (1974); 12 Tex. Jur. 2d Conflict of Laws, Section 9, p. 308-309. See also Leflar, *American Conflicts Law*, 350-351 (3 ed. 1977); Restatement 2d—Conflict of Laws, Sec. 188.

to Rollins including witnesses with knowledge as to any "defects" in the property must also be brought to Texas. Balanced against this is WSI's burden of taking to Louisiana its corporate officer (or officers) who negotiated the purported contract with CLAW, and who have knowledge of the corporation's dealings with Donald Antie. Further, CLAW believes the payments received by Don Antie from WSI arising out of the business he was supposedly negotiating on behalf of CLAW may constitute commercial bribery[5] and a third-party claim against Mr. Antie may be necessary. Mr. Antie, his records, and the bank where he deposited the payments are located in the Middle District of Louisiana. Also, trial by jury has been requested, and "jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947).

The balance is overwhelmingly in favor of transferring this case to Baton Rouge. If this case is forced to trial in Beaumont, Texas, it "will bring about exactly the kind of mischievous consequences against 'the interest of justice' that §1404(a) was designed to prevent, that is, unncessary inconvenience and expense to parties, witnesses, and the public." *Continental Grain Company v. The FBL - 585*, 364 U.S. 20, 21, 80 S. Ct. 1470, 1472 (1960).

IV.

With its motion to transfer, CLAW filed a detailed affidavit setting forth the names, locations, and expected testi-

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5. The actions of WSI and Mr. Antie are seemingly in violation of Louisiana Revised Statute 14.74, Vernon's Texas Codes, Penal Code, Title 7, Chapter 32.43, and 18 U.S.C. § 1952.

mony of witnesses who would only be subject to subpoena in the Middle District of Louisiana. Neither WSI nor Rollins opposed this showing nor made a showing of their own. WSI, the only Texas party, has never filed an opposition of any kind to CLAW's motion. Rollins filed an opposition to the alternate request which sought to transfer of the cross-claims only.

Despite the clear-cut and unopposed showing made by CLAW, the district court denied the motion to transfer. The only conceivable connection the present case has with the Eastern District of Texas is that WSI resides there. But this is exactly the kind of situation §1404(a) was meant to remedy.

> "§1404(a) operates on the premises that the plaintiff has properly exercised his venue privilege. This distinction underlines the fact that Congress, in passing §1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one." *Van Dusen v. Barrack, supra*, 376 U.S. at 634, 84 S. Ct. at 818.

1. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THE SUPREME COURT REGARDING CHANGES OF VENUE.

The spirit of Section 1404(a) of Title 28 is that a transfer is to be merely a change in courtrooms, to promote justice and judicial efficiency.

> Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. The purpose of the section is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary

> inconvenience and expense . . . ." *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964).

The Court in *Van Dusen* and *Gulf Oil* identified as major factors to be considered the convenience of the parties; the convenience of the witnesses; the parties' access to sources of proof, including the availability of compulsory process; the cost of obtaining attendance of witnesses; the competence of the trial court to deal with the legal issues likely to arise; the avoidance of multiplicity of litigation; and plaintiffs' choice of forum. In this case, these factors mandate transfer. This Court stated in *Continental Grain*, supra, that "The idea behind §1404(a) is that where a 'civil action' to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court. That situation exists here."

That situation even more certainly exists here. The issues presented require the application of Louisiana law and trial would be infinitely more convenient in Louisiana. The interest of justice requires that CLAW must not be forced to litigate claims totalling millions of dollars, and the officers of CLAW must not be required to defend claims against their personal integrity, without being able to subpoena necessary witnesses. This Court has recognized that "Section 1404(a) was devised to avoid needless hardship and even miscarriage of justice . . . ." *Hoffman v. Blaski*, 363 U.S. 335, 351, 80 S. Ct. 1084, 1093 (1960). The lower court decisions will mean injustice to CLAW and hardship to many others. They are in direct conflict with the guiding principles of this Court's decisions inter-

preting §1404(a). CLAW respectfully requests the grant of certiorari to review the judgments below.

2. THE DECISIONS BELOW ARE CONTRARY TO THE PURPOSE AND INTENT OF 28 U.S.C. § 1404(a) AND THE FEDERAL RULES OF CIVIL PROCEDURE AND ARE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The decisions below are directly contrary to the Congressional purpose and intent behind § 1404(a) and if allowed to stand will undermine the integrity of § 1404(a) and will subvert the spirit and intent of the Federal Rules of Civil Procedure.

As noted in this Court's decisions, the clear intent of Congress was for § 1404(a) to promote convenience and justice. The liberal rules of venue and joinder and the doctrine of ancillary jurisdiction are also designed to promote efficiency, convenience, and justice. However, in this case, these rules have allowed a very complex litigation to develop in a most inconvenient forum. § 1404(a) provides the means to avoid inconvenience and injustice by transfer to a more appropriate forum. CLAW timely moved for this relief. The most cursory review of the many cases dealing with § 1404(a) would show that transfers are routinely ordered in circumstances much less compelling than those at bar.

If it is within the power of a federal court to avoid injustice without prejudice to other parties, CLAW submits the failure to act is an abuse of discretion which diminishes the integrity of the law and respect for the judicial system. The intent of Congress is subverted and § 1404(a) becomes meaningless.

Perhaps the truth will not come out in every lawsuit litigated, but that is supposed to be the goal of our system. When a court has the power to do so, and fails to take action that would better insure a just and truthful result, review by this Court is warranted. CLAW submits that the interests of truth and justice compel such review in this case.

3. THE LOWER COURT DECISIONS WERE CLEARLY ERRONEOUS AND REVIEW IS REQUIRED TO PREVENT INJUSTICE.

In its opinion the district court offered three reasons for its decision. The district court stated:

> "Defendants have not made a clear-cut showing that a transfer, when considered regarding **all parties,** would be more convenient to the parties and witnesses. It appears more likely that a transfer would merely shift the inconvenience inherent in the maintenance of this action from these Defendants **to the other parties to the action.**" (Emphasis added)

The district court did not indicate how the transfer to Louisiana would shift the inconvenience from CLAW to the other defendant, Rollins, when that defendant is in fact operating the injection well site in the Middle District of Louisiana. The district court failed to articulate a single fact in support of its conclusion. The district court did not allude to the location of any of the witnesses or proofs. The district court failed to articulate any application of the factors which should have governed the exercise of its discretion.

The district court also stated that the interest of justice would not be served by transfer because:

> "This court has already invested much time and effort in this case having held one trial, several conferences and hearings, and having spent considerable time becoming informed on the issues and facts of the case."

With all due respect, this is simply not accurate. The "trial" referred to was the original hearing on injunctive relief, held 12 days after the suit was originally filed. The docket sheet will indicate only two hearings have been held, both of which involved injunctive relief. More importantly, since undersigned Louisiana counsel entered the case in May, 1979, there have been no hearings or conferences. The majority of the pleadings now controlling have been filed since that time, and the great majority of discovery has been undertaken since that time, and is not yet complete. At the present time a trial date has been continued indefinitely.

The district court denied CLAW's alternative request, holding that separate trials would involve proof of similar issues and might lead to conflicting judgments. However, the "contract" claim of WSI is in no way related to the claim between CLAW and Rollins over whether condition of the well was defective or misrepresented. The claim of Rollins, for indemnification from CLAW in the event Rollins is held liable to WSI on the principal demand, can easily be retained and tried with the principal "contract" demand, while the claims on the well are severed under Rule 42. Conflicting adjudication is not a problem if the discretion of the district court is used wisely.

It seems apparent the district court considered the motion only from the perspective of the Texas party, WSI, who did not even bother to file an opposition to CLAW's

motion. The purpose and intent of Congress and this Court's decisions interpreting § 1404(a) make it clear considerations of convenience and justice should overrule any notions that a plaintiff is entitled to a home-court advantage.

The decision of the district court was erroneous and an abuse of its discretion. The court of appeals abused its discretion and was in error in not reviewing that decision. CLAW cannot fathom the appellate court's failure to at least order an answer to CLAW's petition for review when the motion to transfer was practically unopposed in the district court. The summary denial of CLAW's petition by the appellate court is especially puzzling in light of its prior opinions. The case of *Koehring v. Hyde Construction Co.*, 324 F.2d 295 (5 Cir. 1963), in which the Fifth Circuit overturned a district court decision and ordered a transfer, is on four corners, involving a fact situation almost identical to the one at bar. (Please see excerpt of *Koehring* opinion in Appendix). The facts in this case are clear. Trial should be held in the Middle District of Louisiana. The appellate court's decision was erroneous, was contrary to its own precedent, and perpetuates injustice. For these reasons a writ of certiorari should issue.

CONCLUSION

It is unfortunate that a civil suit involving millions of dollars may be tried in an inconvenient forum where the best proofs and live testimony are not available when trial could be held within 30 miles of the physical property involved. Not only is the situation at present unjust, but Congress has passed a specific remedial statute, which has been elucidated in several opinions of this Court, to relieve such injustice. The words of § 1404(a) should be given meaning, not thrown out the window and ignored, and the integrity of our laws and the decisions of this Court should be guarded. The facts in this case are clear-cut and undeniable. CLAW respectfully requests the issuance of a writ of certiorari to review the decisions of the lower courts.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WASTE SYSTEMS, INC.	)	
	)	
VS.	)	NO. B-78-526-CA
	)	
CLEAN LAND AIR WATER	)	
CORPORATION AND ROLLINS	)	
ENVIRONMENTAL SERVICES, INC.	)	

ORDER

On this date came on for consideration the Motion by Defendants, Clean Land Air Water Corporation, Cyril Hinds, Lawrence J. Thompson and L. E. Hughes, for Separate Trials and Change of Venue and the responses thereto.

The Court is of the opinion that a transfer of this case to the United States District Court for the Middle District of Louisiana would not promote the convenience of the parties and witnesses nor be in the interest of justice. *See*, 28 U.S.C. §1404(a). Defendants have not made a clear-cut showing that a transfer, when considered regarding all parties, would be more convenient to the parties and witnesses. It appears more likely that a transfer would merely shift the inconvenience inherent in the maintenance of this action from these Defendants to the other parties to the action. *See, Kane v. Hallmark Ins. Co.*, 409 F.Supp. 467 (S.D.Fla. 1976). Furthermore, the interest of justice would not be served by a transfer of this action. This Court has already invested much time and effort in this case having held one trial, several conferences and hearings, and having spent considerable time becoming informed on the issues and facts of the case. A transfer of this

case would hinder the policy of proper conservation and utilization of judicial resources central to efficient and effective judicial administration. *See, Smith Kline Corporation v. Sterling Drug, Inc.*, 406 F.Supp. 52, 55 (D.Del. 1975).

The Court is further of the opinion that it would not serve the ends of justice to order separate trials of the cross-actions under Fed.R.Civ.P. 42(b) or to sever the cross-actions under Fed.R.Civ.P. 21 and order a transfer of the cross-actions under 28 U.S.C. §1404(a). Adjudication of the primary claims and the cross-actions will involve proof of many of the same issues and facts and the piecemeal trial of these separate claims is not in the interest of efficient judicial administration and might lead to conflicting adjudications.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendants' motion be, and hereby is, in all things denied.

SIGNED this 23rd day of January, 1980.

UNITED STATES DISTRICT JUDGE

s/ William M. Steger

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1459

In Re:

CLEAN LAND AIR WATER CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that petitioner's motion for stay pending disposition of the writ of mandamus is DENIED.

In *Koehring v. Hyde Construction Co.*, 324 F.2d 295 (5 Cir. 1963), the Court of Appeals for the Fifth Circuit wrote:

"Many of the elements mentioned in Gulf Oil as important are present here. The concrete cooling and mixing **plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma**; if, in view of the complexity of its operation, an **on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or near the plant site,** and the **records** of the U.S. Corps of Engineers **dealing with the functioning of the plant** are kept in Tulsa. Moreover, the docket in the Southern District of Mississippi is extremely congested, while that of the federal district court in the Northern District of Oklahoma is relatively current. Thus, every factor points to Oklahoma as the most logical forum for this action, whereas, **the only connection which Mississippi has with this case is that one party to this suit resides there.** This case is similar to *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*, 7 Cir., 1955, 220 F. 2d 299. There the Court pointed out that if 'convenience of the parties' were the sole criterion, the refusal of the trial judge to transfer under Section 1404(a) could be sustained, since the plaintiff did in fact live in the district where suit was brought. There were, however, other statutory criteria to be considered. The Court stated:

" 'As to the second test "convenience of witnesses" it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. **A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from Des Moines**, the two cities where the trial might be held. * * * There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago.'

"The Seventh Circuit then went on to discuss the 'interest of justice,' which it felt should be given paramount consideration: 'In the **interest of justice** there should be considered the **relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing witnesses; the possibility of a view of the premises**; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred.' The Court concluded that in these circumstances it was warranted in ordering the cause transferred to the proper forum. The same factors obtain here, and we have reached the same conclusion." (Emphasis added)

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APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, WASTE SYSTEMS, INC. IN OPPOSITION

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CLEAN LAND AIR WATER CORPORATION,

Petitioner,

v.

WASTE SYSTEMS, INC. AND
ROLLINS ENVIRONMENTAL SERVICES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, WASTE SYSTEMS, INC. IN OPPOSITION

OPINIONS BELOW

The opinions delivered in the courts below are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Was there a failure by the district court to correctly apply and construe 28 U.S.C. Sec. 1404(a), or to consider the relevant factors incident to a ruling upon a motion to transfer, or was there a clear abuse of discretion on its part.

Was there a clear abuse of discretion on the part of the court of appeals.

STATUTORY PROVISION

United States Code, Title 28: Sec. 1404, Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

ARGUMENT

It is well established that the moving party in a motion for transfer under 28 U.S.C. Sec. 1404(a) has a heavy burden, in that it must make a "clear cut showing that when all interests are considered, trial would more conveniently proceed and the interests of justice would be better served in the other district." *Riso Kagako Corp. v. A. B. Dick Co.*, 300 F. Su-p. 1007 (S.D.N.Y. 1969). The interests to be considered in passing on the motion are the convenience of the parties and witnesses, and the promotion of justice. CLAW has not sustained its burden pursuant to this provision.

I.

A movant does not satisfy its burden where it fails to support the motion with affidavits, depositions, or other documents establishing the requisite elements for transfer. *See Plum Tree, Inc. v. Stockment,* 300 F.2d 754 (3d Cir. 1973).

Petitioner submitted an affidavit to the District Court containing the names of witnesses who would be subject to subpoena only if the case were transferred to the Middle District of Louisiana. However, with the exception of one individual who allegedly saw a check payable to Donald Antie, the descriptions of the testimony to be offered indicate only that the named witnesses may possess information relevant to the CLAW-ROLLINS litigation rather than the action by WSI against CLAW.

To date, the showing as against Waste Systems, Inc., consists of conclusory assertions in CLAW's petition to the effect that WSI has only four (4) witnesses and that denial of the transfer would cause unidentified witnesses "crucial and necessary" to petitioner's cause in the WSI-CLAW litigation to be without the subpoena power of the Eastern District of Texas. It is evident that CLAW is urging a transfer without any consideration for the convenience of WSI or its witnesses.

II.

The net effect of granting a transfer would be to shift the inconvenience attendant to this action to the shoulders of the original plaintiff, WSI, and its witnesses. The plaintiff's choice of forum is a paramount consideration in any transfer request, and should not be disturbed unless the balance of convenience is strongly in favor of the defendant. *Shutte v. Armso Steel Corp.,*

431 F.2d 22 (3d Cir. 1970), *cert. denied,* 401 U.S. 910 (1971). This Court recognized that a transfer will not lie where it will effect a mere shifting of inconvenience when it stated that "1404(a) provides for a transfer to a more convenience forum, not a forum equally convenient or inconvenient." *Van Dusen v. Barrack,* 376 U.S. 612 (1964).

If venue is changed to the Middle District of Louisiana, witnesses and records critical to WSI's actions against both Rollins and CLAW will be without the subpoena power of that Court. Those witnesses who voluntarily attend trial will be greatly inconvenienced. Preparation for a local trial will be put to waste. Further, WSI will be prejudiced in that employees essential to its operations will be forced to attend a distant forum for an indeterminate length of time.

III.

To the extent that Louisiana law may be applicable to the issues in controversy, said factor does not militate in favor of a venue change. Transfers on the basis that foreign law must be applied are disfavored unless the law is unclear or there is some difficulty in its application. *See Calva v. American Air Lines, Inc.,* 177 F. Supp. 238 (D. Minn. 1959). Louisiana law governing the interpretation of contracts, capacity to contract, and the sale of property is relatively clear, and obviously does not warrant a change of forum.

IV.

The decision of the lower courts did not constitute abuses of discretion. In *A. J. Industries v. United States Dist. Ct. C.D. of Cal.,* 503 F.2d 384 (9th Cir. 1974), failure of the trial court to even issue an opinion stating

its reasons for granting a transfer was held not to constitute an abuse of discretion, where briefs and transcripts of the hearing indicated that all issues were before the court and that the court took ample time to consider them. Both CLAW and Rollins submitted memoranda with respect to the motion. The court was well apprised of the legal issues and facts. Moreover, the court issued an opinion in which it concluded that transfer would only result in a shifting of inconvenience with respect to the parties and witnesses. Clearly, failure of the district court to articulate the specific facts which support its conclusions was not a clear abuse of discretion, and CLAW's contention is therefore without merit. In essence, petitioner's position is that the court erred by taking cognizance of WSI's interests in this litigation.

V.

As a delaying tactic, a 1404(a) motion is unsurpassed. WSI filed suit on August 2, 1978, yet CLAW did not move for change of venue until September 24, 1979. Respondent believes that any inconvenience borne by CLAW is far outweighed by the public interest in the resolution of this litigation.

CONCLUSION

CLAW has failed to demonstrate that WSI's action in the Eastern District of Texas is so inconvenient as to warrant a change of venue. In effect, CLAW seeks to shift the inconvenience inherent in this matter to the plaintiff and its witnesses. The facts of this case simply do not call into play 28 U.S.C. Sec. 1404(a). Furthermore, the delay and additional expense caused by appeal of this motion are not consonant with the premises of

judicial economy and justice upon which 28 U.S.C. 1404(a) is founded. For these reasons, WSI respectfully requests that CLAW's petition for a writ of certiorari be denied.

Respectfully submitted,

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